**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 3520 OF 2011

1. Nilabai Babu Limkar,
Age: 33 years, Occ: hh
R/o. Nanda Mashai Patty,
Tq. Bhokar, Dist. Nanded.

2. Babu s/o Gangaram Limkar,
Age: 37 years, Occ: Labour,
R/o. As above. ...Appellants

versus

1. Omprakash s/o Ram Bakhas,
Age: Major, Occ: Business (truck owner),
R/o. 2410, Bera Jaton wala ward No.6,
The – Bilara Jodhpur (Rajasthan).

2. The New India Assurance Co. Ltd.
Through its Branch Manager branch
At 465, 6th Road Sardapura Jodhpur
(Rajasthan).

3. The New India Assurance Co. Ltd.
Through its Branch Manager Branch at
Lahoti complex Vazirabad, Nanded. ...Respondents

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Mr. V.V. Bhavthankar, Advocate for appellants
Mr. V.R. Mundada, Advocate for respondent No.2.
Mr. A.G. Gatne, Advocate for respondent No. 3.

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CORAM : N.W. SAMBRE, J.

DATE : 10th JUNE, 2015

ORAL ORDER :

This appeal is by the claimants. Respondent No.1 is the vehicle owner, whereas respondent Nos. 2 and 3 are Insurance Companies with whom the vehicle involved in the accident was insured.

2. On 21/10/2004 at about 10-30 a.m. the son of appellants namely Sainath while crossing the road dashed against the vehicle bearing Registration No. RJ-19-2G-0315 resulting into death of Sainath on the spot. Upon police complaint, the investigating agency registered crime against the truck driver for rash and negligent driving.

3. The appellants herein under the provisions of Section 166 of the Motor Vehicles Act filed M.A.C.P. No. 63 of 2010 claiming compensation of Rs. 2,00,000/-.

4. The tribunal at Exhibit-27 framed the following issues and answered the same accordingly.

(1) Do petitioners prove that the deceased Sainath s/o Babu Limkar died because of motor accident?	Yes
(2) Do petitioners prove that rash and driving of the vehicle truck bearing registration No. RJ-19-2G-0315 was the cause of accident?	Yes
(3) Do respondents No. 2 and 3 prove that the driver of the truck was not holding valid driving licence at the time of accident?	Yes

(4) Do the respondents No. 2 and 3 prove that accident was caused because of own negligence of father of the deceased?	No
(5) Whether petitioners are entitled for compensation? If yes, what assessment, apportionment, if any and from whom?	Yes. Rs.1,57,000/- inclusive of NFL amount from R. No. 1 only.

5. The tribunal ordered payment of compensation of Rs. 1,57,000/- including Rs.50,000/- under No Fault Liability with interest @ 6% p.a. The tribunal ordered that the amount be paid by respondent No.1 vehicle owner. The reason for ordering respondent No.1 to pay the amount ordered under award was that the driver of the vehicle was holding licence to drive two wheeler and four wheeler (Light Motor Vehicle) and not heavy vehicle.

6. The appellants, as such, claimed that the appeal preferred by them is required to be allowed with direction to respondent Nos. 2 and 3 to pay the amount and if required, may recover the same from respondent No.1 vehicle owner.

7. In support of this contentions, the learned Counsel for the appellants has relied upon the judgment of this Court in the matter of ***Sarubai w/o Nagorao Lokhande and others vs. Surendrasing s/o Chabilaram Dhariwal and another*** reported in ***2014(6) ALL MR 395***.

8. Mr. Gatne, learned Counsel for the respondent Insurance Company, while taking me through the mandate of Apex Court in the matter of ***National Insurance Co. Ltd. vs. Swaran Singh and others*** reported in ***2004 ACJ 1*** and also in the matter of ***Bhuwan Singh vs. M/s. Oriental Insurance Co. Ltd. and another*** reported in ***2009(2) All MR 913***, would urge that the observations made by learned tribunal are just and proper, as according to him, there was fundamental breach of the terms of the policy. According to him, the appeal is liable to be rejected, as interest of the appellants is already taken care of by the tribunal.

9. Having considered the rival contentions of the parties, the only point pressed and canvassed by learned Counsel for the appellants is, whether the appellants are entitled to recover the amount from the insurance company?

10. It is required to be noted that for ordering payment of compensation amount to respondent No.1 vehicle owner, the cause cited in the award was that the vehicle owner was holding licence which does not permit him to drive heavy vehicle but only light motor vehicle.

11. It is required to be noted that whether the above referred breach can be considered as fundamental breach of the policy?

12. In the matter of National Insurance Co. Ltd., vs. Swaran Singh cited supra, the Apex Court in paragraph-102 (vi) observed thus :

> *"(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply 'the rule of main purpose' and the concept of 'fundamental breach' to allow defences available to the insurer under section 149(2) of the Act."*

13. The Apex Court has noticed that if breach or breaches of the condition of policy is/are so fundamental as are found to have contributed to the cause of the accident, then only insured will be liable to pay compensation.

14. It is also required to be noted that in the matter of ***Oriental Insurance Co. Ltd. vs. Angad Kol and others*** reported in

AIR 2009 SC 2151, the Apex Court while dealing with somewhat similar contingency has ordered the insurer i.e. respondent Insurance Company to deposit compensation amount with liberty to recover same from owner and driver of the vehicle.

15. Based on the above referred view, in the judgment of Sarubai w/o Nagorao Lokhande and others cited supra this Court has that already taken a view that the amount is required to be paid by insurer first and then insurer will at liberty to recover same from vehicle owner.

16. In the light of above referred law, it is required to be noted herein that truck driver admittedly was holding valid driving licence of light motor vehicle. Breach appears to be that of not holding driving licence to drive heavy vehicle.

17. During course of investigation, it was established that the driver of vehicle in question is responsible for the accident caused. In view of above, in my opinion, the said breach i.e. not holding driving licence to drive heavy vehicle but holding licence to drive light motor vehicle entitles insurance company to recover the amount as ordered by the tribunal to be recovered from vehicle owner.

18. As such, the first appeal stands allowed. The order of Motor Accident Claims Tribunal, Bhokar passed in M.A.C.P. No.63 of 2010 on 19/07/2010 stands modified as under;

(a) Respondent Nos. 2 and 3 shall pay Rs.1,57,000/- (Rs. One lakh fifty seven thousand only) to petitioner Nos. 1 and 2 inclusive of NFL amount of Rs.50,000/- towards compensation u/s 166 of Motor Vehicles Act along with interest @ 6% per annum from the date of filing of the petition till its realisation.

(b) Respondent Nos. 2 and 3 will be at liberty to recover the above referred amount from respondent No.1.

19. The first appeal, as such, stands allowed in above terms.

[**N.W. SAMBRE, J.**]

Tupe/10.06.15